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No. 84-623

IN THE

Supreme Court of the United States

October Term, 1984

CINCINNATI BELL TELEPHONE COMPANY,
Appellant

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, and BRIEF FOR GTE SERVICE CORPORATION AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The GTE Service Corporation and its 17 affiliated domestic telephone operating companies ("GTE" or "the GTE Companies")[1] hereby seek leave of the Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, urging the Court to summarily reverse or in the alternative to note its probable jurisdiction over the appeal from the decision of the Supreme Court of Ohio[2] which refused to give effect to a 1983 order of the Federal Communications Commission ("FCC")[3] directed against, *inter alia*, the Public Utilities Commission of Ohio ("PUCO") on the ground that the federal order was *ultra vires*. The *1983 Preemption Order*, as affirmed by the Fourth Circuit, had preempted state regulation of depreciation rates and methods of certain telephone carrier assets where the FCC had prescribed such rates and methods. The Ohio Supreme Court affirmed a PUCO order that purported to impose depreciation rates inconsistent with those prescribed by

[1] The affiliates are listed in Appendix A.

[2] *Cincinnati Bell Telephone Co.* v. *Public Utilities Comm'n of Ohio*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984) ["Cincinnati Bell Telephone"].

[3] *Uniform System of Accounts and Petition for Declaratory Ruling on Question of Federal Preemption*, 92 F.C.C.2d 864 (1983) ["1983 Preemption Order"], *on reconsideration* of 89 F.C.C.2d 1094 (1982) ["1982 Preemption Order"], *aff'd, Virginia State Corp. Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), Motions for Hearing En Banc Denied ["VSCC"].

the FCC. This motion is required by reason of the refusal of counsel for appellant Cincinnati Bell Telephone Company ("CBT") to grant permission to file an *amicus curiae* brief.[4]

INTEREST OF THE *AMICUS CURIAE*

The GTE Companies, including General Telephone Company of Ohio ("General of Ohio"), provide intrastate and interstate telecommunications service under regulation by the FCC and state regulatory commissions. The GTE Companies operate in 31 states, serving approximately 12 million subscribers. The GTE Companies, including General of Ohio, have actively participated in FCC depreciation proceedings.[5] On June 7, 1982, General of Ohio filed a Petition for Declaratory Ruling with the FCC seeking an order preempting PUCO from prescribing for General of Ohio any depreciation accrual rates and methods other than those prescribed by the FCC. On June 8, 1982, GTE and other independent telephone companies filed a Joint Petition for Clarification seeking, *inter alia*, explicit recognition that FCC action prescribing depreciation methodologies and rates is binding on both the carriers and on the state commissions.[6] General of Ohio's Petition was granted by the FCC in the *1983 Preemption Order*, 92 F.C.C.2d at 880.

PUCO, however, did not adhere to the FCC order. On March 9, 1983, PUCO issued an order requiring CBT to use

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[4] The consent of the Office of the Consumers' Counsel, State of Ohio and the Public Utilities Commission of Ohio are contained in Appendix B.

[5] *See, e.g., Property Depreciation*, 83 F.C.C.2d 267 (1980), *reconsideration denied*, 87 F.C.C.2d 916 (1981); *Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).

[6] GTE was joined in the petition by the companies comprising the United Telephone System and Continental Telecom Inc. on behalf of their operating companies. GTE's Petition for Clarification was dismissed as untimely. However, the FCC stated that it would consider the substance of the petition in connection with a petition for reconsideration of the *1982 Preemption Order* which had been filed by AT&T. *See 1983 Preemption Order*, 92 F.C.C.2d at 865 n.1. AT&T's Petition for Reconsideration was granted by the FCC in the *1983 Preemption Order*.

whole life depreciation rates instead of the remaining life rates that had been prescribed by the FCC, until a court of competent jurisdiction held otherwise. CBT appealed to the Ohio Supreme Court, but that Court ruled that the FCC Order was *ultra vires* and that the depreciation methodology adopted by PUCO was, therefore, reasonable and lawful. *Cincinnati Bell Telephone*, 12 Ohio St. 3d at 284, 466 N.E.2d at 853.

If the decision of the Ohio Supreme Court is permitted to stand, the GTE Companies will be subject to inconsistent depreciation requirements imposed by the FCC and the several states. Specifically, the GTE Companies will be ordered by the FCC to employ certain depreciation methodologies and rates prescribed by that agency for both interstate and intrastate ratemaking purposes while at the same time various state commissions will require the GTE Companies to employ entirely different methodologies and rates for those same purposes. In the present competitive environment fostered by federal telecommunications policy, it is imperative that the GTE Companies and all telephone operating companies be subject to uniform and consistent depreciation practices. The FCC with the affirmance of the federal judiciary has recognized the important relationship between depreciation practice and the ability of a telephone company to compete. As the Fourth Circuit observed, "although flexibility in depreciation practice presented little threat to the efficient operation of a monopolistic telecommunications industry, improper capital recovery does pose a true threat in today's competitive market." *VSCC*, 737 F.2d at 394. Consequently, GTE has a real and substantial interest in the resolution of the questions raised by CBT. GTE's operations in Ohio and throughout the rest of the nation will be seriously affected by the outcome of this case.[7]

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[7] In the case of General of Ohio, the FCC noted that there is a substantial difference between the depreciation rates ordered by PUCO and the FCC-prescribed rates. When General of Ohio filed its Petition for Declaratory Ruling in 1982, the differential in rates amounted to $7,000,000. *1983 Preemption Order*, 92 F.C.C.2d at 878. To date, PUCO refuses to recognize FCC depreciation prescriptions for ratemaking purposes.

The annexed brief describes why the decision of the Ohio Supreme Court was incorrect and the adverse impact it will have on the GTE Companies. It also points out that should this Court deny its jurisdiction and permit the PUCO order to stand, confusion and uncertainty will prevail precisely at a time when the FCC has concluded that a consistent national policy governing capital recovery is essential to the success of the federal goal promoting competition in the provision of telecommunications services and facilities.

Therefore, the Court is respectfully requested to grant this motion for leave to file the annexed brief.

Respectfully submitted,

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Uniform System of Accounts, 85 F.C.C.2d 818 (1981) 1

Miscellaneous

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BRIEF FOR GTE SERVICE CORPORATION AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the motion to which this brief is appended.

SUMMARY OF THE ARGUMENT

The basic issue before the Court is whether the Ohio Supreme Court has jurisdiction to pass on the merits of, much less declare *ultra vires*, the FCC's *1983 Preemption Order. Uniform System of Accounts and Petition for Declaratory Ruling on Question of Federal Preemption*, 92 F.C.C.2d 864 (1983) ["1983 Preemption Order"], *on reconsideration of* 89 F.C.C.2d 1094 (1982) ["1982 Preemption Order"], *aff'd, Virginia State Corp. Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), Motions for Hearing En Banc Denied ["VSCC"]. In so doing, the Ohio Court overrode the preemptive effect of the FCC order and sanctioned a state regulatory ruling which by its terms ordered CBT to "utilize whole life depreciation accrual rates instead of the remaining life rates ordered by the FCC. . ." *Cincinnati Bell Telephone Co.* v. *Public Utilities Comm'n of Ohio*, 12 Ohio St.

3d at 280, 281, 466 N.E.2d 848, 850 (1984) ["Cincinnati Bell Telephone"].

The Ohio Supreme Court has no jurisdiction to refuse to give effect to an FCC order or declare such order *ultra vires*. The FCC's order was effective when issued, and bound PUCO and other state agencies unless reversed or revised on appeal. As the Court stressed recently in *FCC* v. *ITT World Communications, Inc.*, 104 S. Ct. 1936 (1984), the federal courts of appeal are vested with exclusive jurisdiction to review FCC orders. As a result, the Ohio court had no power to review the FCC's order.

This point is dispositive of the question at issue and there is no need for the Court here to consider the merits of the preemption question. In any event, the analysis and holding of the Court's recent unanimous decision in *Capital Cities Cable, Inc.* v. *Crisp*, 104 S. Ct. 2694 (1984) ("Capital Cities"), confirming the preemptive power of the FCC applies *a fortiori* to the effect of the FCC's *1983 Preemption Order*. Therefore, the Court should summarily reverse the decision below or in the alternative note its probable jurisdiction.

ARGUMENT

I. The Federal Courts of Appeal Have Exclusive Jurisdiction to Review the Federal Communications Commission's Action Preempting Inconsistent State Regulation of Depreciation Rates and Methodology.

The Ohio Supreme Court was without jurisdiction to review the *1983 Preemption Order*, much less declare it to be *ultra vires*. As the Court recently reiterated, pursuant to Section 402 of the Communications Act of 1934, 47 U.S.C. § 402, and Section 2342 of Title 28 of the United States Code, 28 U.S.C. § 2342, exclusive jurisdiction for review of final FCC orders lies in the federal courts of appeal. *FCC* v. *ITT; see also South Central Bell Telephone Co.* v. *Louisiana Public Service Commission, et al.*, No. 83-3494, slip op. at 15 (5th Cir. October 11,

1984); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission, et al.*, 738 F.2d 901 (8th Cir. 1984), reversing *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 584 F. Supp. 1087 (D.C. Ark. 1984), *petition for cert. filed*, 53 U.S.L.W. 3290 (U.S. September 28, 1984) (No. 84-483).[1] The *1983 Preemption Order* was such a "final" order issued by the Commission in response to both a petition for reconsideration of the *1982 Preemption Order* filed by AT&T and a Petition for Declaratory Ruling filed by General Telephone Company of Ohio ("General of Ohio").[2] The appropriate procedure for obtaining judicial review of the FCC's order was by appeal to the United States Court of Appeals. The Ohio Supreme Court had no jurisdiction to consider the claim that the federal order was *ultra vires*. See *FCC* v. *ITT*, 104 Sup. Ct. at 1937.[3]

If this Court were to permit the decision of the Ohio court affirming PUCO's action to stand, it would place the interpretation of the FCC's rules and regulations in the hands of some "700 federal district judges" and an unknown number of state judges, thus threatening the sound development of a coherent national policy. *See South Central Bell Telephone Co.*, slip op. at 20.[4] Accepting the position of the State of Ohio would

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[1] The pertinent texts of Section 402 of the Communications Act and Section 2342 of Title 28 of the United States code are set forth in Appendix C attached hereto.

[2] In its petition, General of Ohio requested that the FCC preempt a PUCO order that denied the company the same depreciation rates for intrastate purposes as had been prescribed by the FCC. *1983 Preemption Order*, 92 F.C.C.2d at 865.

[3] The question of whether the *1983 Preemption Order* was "legislative" or "adjudicatory" does not affect the application of the order. Both "legislative" and "adjudicatory" orders promulgated by administrative agencies are binding on all applicable persons. *See South Central Bell Telephone Company*, slip op. at 17.

[4] The *1983 Preemption Order* has already prompted nine federal actions in addition to this case and the *VSCC* case. *See Southwestern Bell Telephone Co.; South Central Bell Telephone Co.; New England Telephone & Telegraph Co.* v. *Public Utilities Commission of Maine*, No.

undermine principles of federal supremacy recognized and enforced by this Court at least as early as *Fletcher* v. *Peck*, 6 Cranch. 87 (1810). *See also, Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO* v. *Oliver*, 358 U.S. 283, 297 (1959).

The Ohio Supreme Court asserted its authority to review the merits of the FCC's order by reasoning that the proceeding below was not one in which PUCO sought to have the order "enjoined, suspended, set aside or invalidated" but was an appeal of a PUCO order over which the Ohio court possessed statutory jurisdiction. *Cincinnati Bell Telephone*, 12 Ohio St.3d at 283, 466 N.E.2d at 852.[5] The Court however will not allow evasion of exclusive court of appeals jurisdiction. Where the practical effect of a successful attack on the enforcement of a federal order involves a determination of its validity, the statutory procedure for review provided for by Congress is exclusive. The Eighth Circuit made this point in *Southwestern Bell Telephone Co.*, when it rejected a similar rationalization advanced by the Arkansas Public Service Commission which had refused to follow the FCC's prescribed depreciation methods

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83-1779 (1st Cir. June 29, 1984); *Pacific Northwest Bell Telephone Co.* v. *Washington Utilities and Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983), *appeal docketed*, No. 83-3746 (9th Cir. April 7, 1984); *New England Telephone & Telegraph Co.* v. *Public Service Board of Vermont*, 576 F. Supp. 490 (D. Vt. 1983), *appeal docketed*, No. 84-7051 (2d Cir. Jan. 17, 1984); *Wisconsin Bell Telephone Co.* v. *Wisconsin Public Service Commission*, No. 84-C-004 (E.D. Wis. filed Jan. 4, 1984); *Chesapeake & Potomac Telephone Co. of Maryland* v. *Maryland Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983), *appeal docketed*, No. 83-1403 (4th Cir. May 3, 1983); *Northwestern Bell Tel. Co.* v. *Iowa State Commerce Commission*, No. 83-688-A (S.D. Iowa Sept. 27, 1984); *Southwestern Bell Telephone Co.* v. *State Corporation Commission of Kansas*, No. 83-4090 (D. Kan. April 8, 1983). Judicial economy requires that the Court not permit such collateral attacks on the FCC's order where the statutory procedure for appeal is clearly exclusive and the parties involved, such as PUCO which was also a party to the *VSCC* appeal, have already utilized that statutory procedure.

[5] *See also* PUCO Memorandum Contra Petitioner's Application for Stay of Execution of the Judgment of the Supreme Court of Ohio at 14-15.

in the context of a ratemaking proceeding in that state.[6] The Eighth Circuit, in dismissing the Arkansas Commission's argument, found the FCC's *1983 Preemption Order* was no less applicable despite the fact that the Arkansas Commission had not technically sought judicial review of the FCC's order. The court cogently reasoned that:

> Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action. The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review. (citation omitted).

738 F.2d at 906.

The Eighth Circuit's holding is clearly on point here. Challenging the validity of an FCC order in any court other than that specified in Section 2342 — whether that challenge is characterized as an "appeal" or a "defense" — circumvents the language and purpose of the Congressional mandate embodied in Section 2342. Accordingly, the Supreme Court of Ohio had no jurisdiction to deny enforcement of the FCC order on the basis that it was *ultra vires*.

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[6] The Ohio Supreme Court opinion (dated July 25, 1984) expressly relied upon the Arkansas District Court decision, *Cincinnati Bell Telephone*, 12 Ohio St.3d at 283-84, 466 N.E.2d at 852-853, but ignored the Eighth Circuit's reversal several weeks earlier of the result and reasoning of the District Court.

II. Under Established Law the States May Not Take Action Inconsistent with the Depreciation Prescriptions of the Federal Communications Commission.

The foregoing argument is dispositive of the question at issue. There is no need, therefore, for the Court here to reach the issue of whether the FCC Order was *ultra vires* since the Ohio court had no jurisdiction to review the question in the first place. In any event, it is beyond controversy that under the Supremacy Clause state action will be preempted by federal regulations as much as by an Act of Congress when the state action stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress. *Capital Cities*, 104 S. Ct. at 2700; *Fidelity Federal Savings & Loan Co.* v. *de la Cuesta*, 458 U.S. 141 (1982); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The broad authority of the FCC to preempt state regulation which is inconsistent or in conflict with the achievement of federal regulatory objectives has been upheld frequently. *See, e.g., U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (1972); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). The most recent example is the Court's unanimous decision in *Capital Cities* which held emphatically that, "if the FCC has resolved to preempt an area of . . . regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, we must conclude that all conflicting state regulations have been precluded." (104 S.Ct. at 2701) (*quoting United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

The Court's decision in *Capital Cities* arose in a context directly analogous to the present case, *i.e.* where a state's conflicting regulatory action interfered with the FCC's efforts to establish a uniform national telecommunications policy — in that case, with respect to cable television. 104 S. Ct. at 2703. Similarly, the State of Ohio's actions under scrutiny here squarely conflict with federal policies governing the most essential of our telecommunications resources, the telephone industry. As was true in the Oklahoma case, the effect of the

decision at issue is to place entities in the position of being subject to inconsistent state and federal orders. Moreover, the decision appealed from impedes the FCC's efforts to implement a consistent and effective national policy. Thus, it is entirely appropriate to apply here the Court's analysis and conclusions in *Capital Cities*.

In *Capital Cities*, the Court expanded upon its previous analysis in *Fidelity Federal Savings & Loan Ass'n*, where it had held that state regulation is superseded when the federal agency entrusted with administering a Congressional act intended to preempt conflicting state regulation and such preemptive action was within the scope of the agency's authority. *Fidelity Federal*, 458 U.S. at 154. In applying this principle, the Court's resolution of the federal preemption question in *Capital Cities* rested upon affirmative findings with respect to five discernible factors: (1) Whether the FCC had expressed its clear intent to preempt the area of regulation in question. *Capital Cities*, 104 S. Ct. at 2700-2; (2) Whether the FCC's preemptive action furthered an important federal interest, fell within its statutory grant of authority, or was aimed at the achievement of its statutory responsibilities and objectives. *Id.* at 2700-1, 2703-4, 2702-8; (3) Whether the FCC's decision to preempt conflicting state regulation reflected a "pragmatic effort to harmonize state and federal powers within the context of the issues and interests at stake." *Id.* at 2708; (4) Whether the state regulation under scrutiny conflicted with specific federal regulations or rulings. *Id.* at 2703-5; and, (5) Whether the accomplishment of FCC regulatory policies and statutory goals was frustrated by the conflicting state regulation at issue. *Id.* at 2705-2709. Applying these five factors of *Capital Cities* and the *1983 Preemption Order*, as affirmed by the Fourth Circuit, to this case, it is clear that the State of Ohio is precluded from prescribing depreciation rates and practices which conflict with FCC prescriptions.

A. The FCC Has Unambiguously Expressed Its Intent to Preempt Inconsistent State Regulation of Depreciation Rates and Practices

There is no doubt concerning the FCC's intent to preempt inconsistent state regulation governing depreciation methods

and classes of depreciable property — that intent was explicit and unmistakable. *VSCC*, 737 F.2d at 393. Recognizing that uniform application of capital recovery policies is necessary to its goal of an efficiently functioning competitive telecommunications marketplace, the FCC unequivocally held that, "we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates." *1983 Preemption Order*, 92 F.C.C.2d at 880.

B. Federal Preemption is Justified Because It Furthers An Important Federal Interest, Falls Within the Scope of the FCC's Statutory Grant of Authority and Advances the FCC's Statutory Goals

As the Court in *Fidelity Federal* stressed, "[p]reemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal*, 458 U.S. at 152-53 (*quoting Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

Analyzing the Commission's action in terms of the factors used in *Capital Cities* (104 S. Ct. at 2700-1, 2701-4, 2705-6) compels the conclusion that FCC power to preempt conflicting state depreciation regulation is implicitly conferred upon the Commission pursuant to its broad statutory mandate under Section 1 of the Communications Act "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire . . . communication service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151. *See VSCC*, 737 F.2d at 390, 394-396.[7] While the Communications Act does contemplate complementary federal and state

[7] FCC power to preempt conflicting state regulation of depreciation is also explicitly set forth in Section 220(b) of the Communications Act of 1934, 47 U.S.C. §220(b). Section 220(b) mandates preemption in plain, unequivocal language: that the Commission "*shall*" make depreciation prescriptions as to classes of property and rates of depreciation, and that carriers "*shall not*" charge to operating expenses any depreciation charges

regulation, *see* 47 U.S.C. § 152(b), the FCC is given plenary and comprehensive jurisdiction over interstate and foreign communications services and facilities of common carriers and all the terms and conditions upon which such services and facilities are offered to the public. The courts have repeatedly recognized that FCC regulations preempt any contrary state regulations where the efficiency of the national communications network is at stake. *VSCC*, 737 F.2d at 390. *See also, North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) ("NCUC I"). As the Court of Appeals for the District of Columbia Circuit recently held, "[i]f the [Communications] Act's goal of providing uniform, efficient service is ever to be realized, the Commission [FCC] must be free to strike down the costly and inefficient burdens on interstate communications which are sometimes imposed by state regulation." *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission*, No. 83-1354, slip op. at 18 (D.C.Cir. October 26, 1984). *See also Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) ("CCIA"); *North Carolina Util Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) ("NCUC II"). Further, as then Judge Burger stated in *General Telephone Company of California* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir), *cert. denied*, 396 U.S. 888 (1969): "[F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications."

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that are different from those prescribed by the Commission. The FCC found:

> Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practices in form only . . .

92 F.C.C.2d at 869-70. Section 220(b) is set out in Appendix C hereto.

In furtherance of its mandate under Section 1 of the Communications Act, the FCC, with the affirmance of the courts,[8] has implemented policies opening the telecommunications network to competition. *See e.g., First Report and Order, Competitive Carrier Rulemaking*, 85 F.C.C.2d 1, 2, 13 (1980). To promote the new competitive environment, the Commission adopted depreciation "policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices." *1983 Preemption Order*, 92 F.C.C.2d at 877. Thus, as the Fourth Circuit held in the *VSCC* decision, "the regulatory action taken by the FCC was also within its authority to ensure efficient operation of the interstate telephone network." *VSCC*, 737 F.2d 394. Moreover, "the FCC's decision to preempt inconsistent state depreciation practices emerges as a reasonable one, designed to foster the statutory goal [mandated by Section 1 of the Act] of an efficient nationwide telecommunications service." *VSCC*, 737 F.2d at 396.

C. The FCC's Decision to Preempt Conflicting State Depreciation Practices and Rates Represents a Reasonable Accommodation of Federal and State Powers and Interests.

In its *1983 Preemption Order*, the FCC carefully analyzed the relationship between its authority to prescribe depreciation rates and practices and the powers granted the states under the Communications Act to regulate intrastate communications. Observing that "we do not seek controversy unless it is necessary to protect vital federal interests," *id.* at 874, and relying on

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[8] *See e.g., NCUC I*, 537 F.2d at 793-94; *NCUC II*, 552 F.2d at 1045-48; *CCIA*, 693 F.2d at 214-215. On occasion the courts have even prodded the FCC into directions which were ultimately pro-competitive. *See Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956); *MCI Telecommunications Corp.* v. *FCC*, 580 F.2d 590 (D.C. Cir. 1978), *cert. denied sub nom. United States Independent Telephone Association* v. *MCI*, 439 U.S. 980 (1978). Also, the divestiture of the Bell Operating Companies by AT&T was a parallel initiative having overlapping results. *United States* v. *American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

established law and on interpretation of its statutory charter, the FCC concluded that federal preemption of inconsistent state depreciation was consistent with the structured dualism between federal and state powers under the Act. *See Capital Cities*, 104 S. Ct. at 2707-8 (*quoting California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980)).[9] In its pragmatic effort to harmonize federal and state powers under the Communications Act, the FCC was upheld by the Fourth Circuit in rejecting the very argument made below that under Sections 2(b)(1) and 221(b) of the Act, 47 U.S.C. §§ 152(b)(1) and 221(b), the states alone have the right to prescribe depreciation rates for intrastate regulatory purposes.[10] The Commission ruled that the "setting of depreciation rates is not an essentially local incident or practice" but, rather, "has substantial effects upon the administration and development of the interstate telephone network." *1983 Preemption Order*, 92 F.C.C.2d at 875 (footnote omitted). The FCC stressed that while the states had an interest in preserving their authority over intrastate ratemaking, the federal interest in the creation of an efficient, competitive nationwide communications marketplace was paramount, especially since the FCC's prescription of depreciation left intact the remainder of the states' ratemaking authority.[11]

Thus, as the Court held in *Capital Cities*, "[w]hen this limited interest is measured against the significant interference with the federal objective" — in this case, of ensuring the proper development of the nationwide telecommunications network — "it is clear that the state's interest is not of the same stature as the goals identified in the FCC's rulings and regulations." *Id.* at

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[9] Throughout the course of the depreciation proceedings, the FCC attempted to harmonize federal and state interests. *See e.g., 1982 Preemption Order* at 1097. The very kind of state resistance involved in this case and reflected *supra* in note 4 forced the FCC to take preemptive action. *VSCC*, 737 F.2d at 394-95.

[10] Section 2(b)(1) and Section 221(b) of the Communications Act are set forth in Appendix C.

[11] The states retained the most important aspects of their ratemaking function: the power to approve rates, create subsidies, and exercise control over the rate base and rate of return. 92 F.C.C.2d at 874-876.

2709. The Fourth Circuit's conclusion that the FCC action was a reasonable accommodation of federal and state concerns, *VSCC*, 737 F.2d at 394-395, brings this case squarely within the logic of *Capital Cities* and must lead to the same result — upholding federal preemption.

D. PUCO's Prescription of Depreciation Practices and Rates Clearly Conflicts with Specific FCC Rulings.

PUCO's own order prescribing depreciation practices and rates for CBT conflicts openly with the specific depreciation prescriptions issued by the FCC. As the Ohio Supreme Court noted, PUCO ordered CBT to "utilize whole life depreciation rates instead of the remaining life rates ordered by the FCC. . ." *Cincinnati Bell Telephone*, 12 Ohio St.3d at 281, 466 N.E.2d at 850. *See Capital Cities*, 104 S. Ct. at 2703-5.

Furthermore in the *1983 Preemption Order*, the FCC granted General of Ohio's Petition for a Declaratory Ruling requesting the preemption of a PUCO order denying General of Ohio the same depreciation rates for intrastate purposes as had been prescribed for interstate purposes. *1983 Preemption Order*, 92 F.C.C.2d at 865, 878-880. Nonetheless, PUCO adamantly refuses to recognize FCC depreciation preemption for ratemaking purposes.

E. The Accomplishment of FCC Regulatory Objectives is Frustrated by Inconsistent State Regulation of Depreciation.

Inconsistent state regulation of depreciation rates and methodologies would undermine the achievement of the broad federal pro-competitive policy in favor of the development of "a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices." *1983 Preemption Order*, 92 F.C.C.2d at 877. As a consequence, regulation such as that adopted by PUCO stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *VSCC*, 737 F.2d at 393.

As the Court of Appeals noted in *VSCC*:

> While it may be true that the effects of depreciation policies are more attenuated than the very direct effect produced by physical connection of equipment to interchangeable lines, it cannot be said that depreciation policies are "separable from" interstate communications. Indeed, the conduct and development of interstate communications would undoubtedly be affected by the states' imposition of depreciation policies that slowed capital recovery and innovation.

Id. at 395. The provision for adequate capital recovery by telephone carriers is essential to the accomplishment of the Commission's mandate under Section 1 of the Communications Act. *See Property Depreciation*, 83 F.C.C.2d 267, 280-281 (1980), *reconsideration denied*, 87 F.C.C.2d 916 (1981); *1983 Preemption Order*, 92 F.C.C.2d at 876. In this new competitive era, "the utilization of proper [depreciation] methods and rates [for telephone carriers] is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of competition to the ratepayers of this country." *1983 Preemption Order* at 874. Due to the capital intensive nature of the telephone industry, improper depreciation accounting methodology has the effect of deferring capital recovery and thereby deprives the public of the benefits of advances in communications technology and serves to "stifle innovation and inhibit the introduction of new technology." *Property Depreciation*, 83 F.C.C.2d at 281. While more timely capital recovery would "result in faster technological innovation with its accompanying benefits of . . . more productive use of facilities . . . improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital." *1983 Preemption Order*, 92 F.C.C.2d at 876-877. See also *Property Depreciation*, 83 F.C.C.2d at 289-90.[12]

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[12] In the *Property Depreciation* order the FCC approved the use of the Equal Life Group (ELG) methodology as a substitute for the straight-line vintage group ("SLVG") methodology and remaining life depreciation procedures as a substitute for whole life procedures. In contrast to SLVG, ELG permits greater precision in allocating costs of service to current

The Fourth Circuit affirming the competent agency found that inconsistent state regulation of depreciation rates and methodologies would frustrate the FCC's capital recovery policy in favor of competition in telecommunications. *See VSCC*, 737 F.2d at 394-96; *see also, 1983 Preemption Order*, 92 F.C.C.2d at 877. As the Commission correctly concluded "[s]tate depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy. . ." *1983 Preemption Order*, 92 F.C.C.2d at 876. Further, the extent of state action attempting to prevent carriers from utilizing FCC depreciation prescriptions would place substantial burdens on carriers and impair their ability to raise the investment capital necessary to fully compete in the continuing evolving competitive telecommunications marketplace. *Id.* at 877.[13]

Faced with mounting and unexpected state opposition, the Commission arrived at the decision to preempt only after careful consideration. Approximately 75 percent of exchange plant

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consumers and allows more rapid capital recovery for plant having a short useful life. *VSCC*, 737 F.2d at 390-91. Similarly, remaining life calculations, unlike whole life methods, allow carriers to recoup the full cost of plant by making corrections in useful life estimates over time. *Id.* at 391. Faced with a multi-billion dollar telephone carrier reserve deficiency caused by the unanticipated shortening of plant service lives, the FCC adopted these methodologies in order to "compel carriers to employ depreciation practices that more truly reflected actual depreciation rates in light of technological reality." *VSCC*, 737 F.2d at 390. *See* Fogarty, *Capital Recovery: A Crisis for Telephone Companies, A Dilemma for Regulators*, Public Utilities Fortnightly 13, 14-15 (December 8, 1983).

[13] Local exchange companies, such as CBT and General of Ohio, are the only ubiquitous service providers in the areas they serve. Their facilities provide the vital link between competitive suppliers and most customers. See *Competitive Carrier Rulemaking*, 85 F.C.C.2d at 22-24. Without adequate and timely capital recovery these local telephone carriers will be unable to continue to maintain a modern basic telecommunications network and to serve as a competitive source for equipment and services. *See 1983 Preemption Order*, 92 F.C.C.2d at 877.

is allocated to the intrastate jurisdiction. *1983 Preemption Order*, 92 F.C.C.2d at 877. As the Fourth Circuit noted "[i]f that large amount of equipment investment should fail properly to reflect its true, rapid depreciation, interstate service would then suffer the effects of delayed innovation." *VSCC*, 737 F.2d at 395. Such a result would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal policy. *Id.* at 393. The enforcement of the decision of the Ohio Supreme Court would have this effect and is "barred by the Supremacy Clause." *Capital Cities*, 104 S. Ct. at 2709.

CONCLUSION

Precedent, as well as the dictates of sound national telecommunications policy, leads to the conclusion that the decision of the Ohio Supreme Court in *Cincinnati Bell Telephone Co.* v. *Public Utilities Commission of Ohio* was incorrect. The Court should summarily reverse the decision below or in the alternative note its probable jurisdiction. Should this Court deny its jurisdiction and permit the Ohio order to stand, confusion and uncertainty will prevail precisely at a time when the FCC and the Fourth Circuit have concluded that

a consistent national policy governing capital recovery is essential to the success of the federal goal — the competitive provision of telecommunications services and facilities.

Respectfully submitted,

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APPENDIX A

LIST OF THE AFFILIATED GTE DOMESTIC TELEPHONE OPERATING COMPANIES

APPENDIX A

List of the Affiliated GTE Domestic Telephone Operating Companies:

General Telephone Company of California

General Telephone Company of Florida

General Telephone Company of Kentucky

General Telephone Company of Southeast

General Telephone Company of Southwest

Hawaiian Telephone Company

Bethel and Mt. Aetna Telephone & Telegraph Company

Garrett Telephone Company, Inc.

General Telephone Company of Illinois

General Telephone of Indiana, Inc.

General Telephone Company of Michigan

General Telephone Company of the Midwest

General Telephone Company of Ohio

General Telephone Company of Pennsylvania

General Telephone Company of Wisconsin

General Telephone Company of Alaska

General Telephone Company of the Northwest, Inc.

APPENDIX B

CONSENT OF THE PARTIES PURSUANT TO RULE 36.1

Office of the
Consumers' Counsel

137 East State Street
Columbus Ohio 43215

November 5, 1984

Adalbert K. Wnorowski
Vice President - General Counsel
General Telephone Company of Ohio
19845 US 31 North
Westfield, Indiana

Re: Cincinnati Bell Telephone Company v. Public Utilities Commission of Ohio, United States Supreme Court, Case No. 84-623

Dear Mr. Wnorowski:

The Office of the Consumers' Counsel, State of Ohio, hereby consents to the filing by GTE Service Corporation on behalf of the GTE domestic telephone operating companies of a brief amicus curiae in the above-captioned proceeding.

Very truly yours,

Richard P. Rosenberry

Richard P. Rosenberry
Associate Consumers' Counsel

RPR/slh

cc: Robert S. Tongren

An Equal Opportunity Employer

BEST AVAILABLE COPY

Attorney General
Anthony J. Celebrezze, Jr.

October 31, 1984

ADALBERT K. WNOROWSKI
Vice President - General Counsel
General Telephone Company of Ohio
19845 US 31 North
Westfield, Indiana

RE: Cincinnati Bell Telephone Company v. Public Utilities Commission of Ohio, United States Supreme Court, Case No. 84-623

Dear Mr. Wnorowski:

The Public Utilities Commission of Ohio hereby consents to the filing by GTE Service Corporation on behalf of the GTE domestic telephone operating companies of a brief amicus curiae in the above captioned proceeding.

Very truly yours,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

Robert S. Tongren

ROBERT S. TONGREN, Section Chief
Assistant Attorney General
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180 East Broad Street
Columbus, Ohio 43215
(614) 466-4395

RST:elm

cc: Richard P. Rosenbury

APPENDIX C

STATUTORY TEXTS

APPENDIX C

Section 2342 of Title 28, 28 U.S.C. § 2342

Jurisdiction of court of appeals:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –

(1) All final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

Section 2(b) (1) of the Communications Act, 47 U.S.C. § 152(b) (1)

Application of Act:

(b) nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . .

Section 220 of the Communications Act, 47 U.S.C. § 222

Accounts, Records, and Memoranda; Depreciation Charges:

(b) . . . The Commission *shall*, as soon as practicable, prescribe for such carriers the *classes of property* for which depreciation charges may be properly included under operating expenses, and the *percentages of depreciation* which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. *Such carriers shall not*, after the Commission has prescribed the classes of property for which depreciation charges may be included, *charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission*, or, after the

Commission has prescribed percentages of depreciation, charge with respect to any class of property *a percentage of depreciation other than that prescribed therefor by the Commission*. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(Emphasis added).

Section 221(b) of the Communications Act, 47 U.S.C. § 221(b)

Special Provisions Relating to Telephone Companies:

(b) . . . nothing in this Act shall be construed to apply, or to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire . . . telephone exchange service . . . in any case where such matters are subject to regulation by a State commission or by local governmental authority.

Section 402 of the Communications Act, 47 U.S.C. § 402

Proceedings to Enjoin Set Aside, Annual or Suspend Orders of the Commission:

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act . . . shall be brought as provided by and in the manner prescribed in Chapter 158 of Title 28, United States Code [28 U.S.C. §§2341 *et seq.*]

(j) Finality of Decision; Review by Supreme Court. The Court's judgment shall be final, subject, however to review by the Supreme Court of the United States. . . .